

Green v JAL Diversified Mgt. Corp.

2013 NY Slip Op 33553(U)

December 24, 2013

Supreme Court, New York County

Docket Number: 150194/2009

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden Justice

PART 11

Index Number : 150194/2009
GREEN, EDIE
vs.
JAL DIVERSIFIED MANAGEMENT
SEQUENCE NUMBER : 0015
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s).
Answering Affidavits - Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: December 24, 2013

HON. JOAN A. MADDEN, J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----- X

EDIE GREEN and BATIA GRINBALT, :

Plaintiffs, :

-against- :

JAL DIVERSIFIED MANAGEMENT CORP., :

EAST 77TH OWNERS, INC., PANORAMA INT. :

CONTRACTING, INC., SALAMON ENG. PLLC, :

DAVID SALAMON, FELD KAMINETZKY & :

COHEN, P.C., VLAD RESTORATION LTD., :

ROBERT LENDHAN and PARKLAND :

CONSTRUCTION, INC., :

Defendant, :

----- X

Joan A. Madden, J.

Index No.: 150194/09

In this action arising out of water leaks in plaintiffs’ cooperative apartment, defendant Vlad Restoration LTD (hereinafter “Vlad”) moves for summary dismissing the complaint and any cross-claims against it. Plaintiffs oppose the motion as does defendants JAL Diversified Management Corp (hereinafter “JAL”) and East 77th Owners Inc (hereinafter “the coop”). For the reasons below, the motion is granted.

Plaintiffs Edie Green (hereinafter “Green”) and her mother Batia Grinbalt (hereinafter “Grinbalt”) are shareholders of apartment 10-H (“the apartment”) in a cooperative apartment building located at 435 East 77th Street, New York, NY (“the Building”). The coop owns the Building and JAL is the Building’s management agent. Vlad was hired by JAL to perform roof work on the Building. Plaintiffs allege that since 1999 a water leak has been entering the ceiling of the building and seeping into the wall of their apartment (apartment 10H). Eventually this structural damage compounded to the point of a ceiling collapse creating a large hole exposing

the apartment to the elements. Plaintiffs contend that the coop and JAL hired several contracting bodies, including Vlad, to remedy this problem. Plaintiffs further allege that these contractors failed to fix the problem, leading to further loss of property as well as the loss of the use of apartment 10H.

At her deposition, Green testified that she and her mother purchased ownership shares in apartment 10H, of 435 East 77th Street, NY, NY, in either 1998 or 1999. According to Green the leak occurred in 1999. The building manager of JAL apparently told Green that she should just live with it because it was a small leak. There were at least three attempted repairs of a large hole in the corner of her apartment, which derived from the sustained leak, but none of these attempts fully repaired the underlying issue of water damage.

The seventh and eighth causes of action are asserted against defendant Vlad and various other “Contractor Defendants.” The seventh cause of action, for negligence, alleges that Vlad and the other Contractor Defendants breached their “duty to fix the cause of the hole and leak in apartment 10H,” thus causing \$30,000 in damages to the apartment, and the loss of use of the apartment. The eighth cause of action, for breach of contract, alleges that East 77th and JAL entered into contracts with the Contractor Defendants to fix the cause of the ceiling collapse/hole leak in Apartment 10-H for the benefit of plaintiffs who are third-party beneficiaries of such contracts.

Vlad moves for summary judgment dismissing the complaint and any cross claims asserted against it arguing that the plaintiffs were not intended beneficiaries of the contract it had with the coop to perform roofing work related to the 12th floor, and that the contract had nothing to do with fixing a leak or hole in the apartment, which was from a small 11th floor

terrace directly above the apartment. Vlad also argues it can not be held liable for any negligence as it did not owe a duty to plaintiffs.

In support of its motion, Vlad relies on the testimony of Wojtek Zebrowski (hereinafter “Zebrowski”), who acted as the foreman in connection with the work performed by Vlad at the building in 2009. Zebrowski testified that Vlad started its work at the building in January 2009, and was hired to perform repair work on the main roof and the two main terraces. The work was completed in a few months. Zebrowski testified that he was never informed of leaking into any of the apartments and was not granted access to these apartments to assess the properties for himself. He denied speaking to Green in her apartment although he testified that he had a conversation with her on the main roof. He further testified that as a “favor” to the architect at the property site, Bob Lenahan, he assisted a plumber at the site install a drain on the 11th floor north-side terrace. According to Zebrowski, this job was completed in a few hours and Vlad did not bill for this labor.

Vlad also relies on the testimony of James B. Pomeroy, who is the President of East 77th Street. Mr. Pomeroy ~~is~~ testified that he observed a water leak in the plaintiff’s apartment in 2004 and that he recommended a leak test at this time, which never materialized. The first leak test occurred in January 2010, the second in October 2010, and the third in June 2012. It was only after this final leak test that East 77th began to solicit bids for contractors to remedy the structural flaw that was definitively determined at that time to be the cause of the leak. Pomeroy also testified that Vlad’s work was focused on the leaking problem on the 12th floor directly under the main roof, and not the 10th floor where plaintiff’s apartment was located.¹

¹Vlad also submits the contract between it and East 77th Street dated November 18, 2008, which contains three options regarding repairs to the main roof and two main terraces.

In opposition, plaintiffs' rely on Green's testimony that Vlad's worker, who she identified at Vojtek, came into her apartment and told her he was there to fix the roof and to prevent water from coming into the apartment, and that he came to her apartment to see if the "interior of what he was fixing." Plaintiffs also rely on Green's testimony that the building manager introduced her to Vlad's worker and told her that Vlad was going to replace the entire roof and the roof replacement would stop water from leaking into her apartment.

JAL and the coop also oppose the motion, arguing that based on Zebrowski's testimony that he was requested by the Building's architect to assist in putting the drain on the 11th floor terrace and that Vlad performed such work, there are issues of fact as to whether Vlad's work caused or contributed to the leak in the apartment.

In reply, Vlad argues, *inter alia*, that there is no evidence that its limited work on the drain caused or contributed to the leak in the apartment.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Here, Vlad has made a prima facie showing entitling it to summary judgment based on evidence that it performed work in January 2009, on the main roof and two main terraces and

There is no reference in the contract to the 11th floor terrace or plaintiff's apartment.

that these areas did not impact the area above plaintiffs' apartment. Furthermore, plaintiffs and the other opposing parties have not controverted this showing. In this connection, while issues of fact exist as to the content of the conversation between Green and Vlad's employee, and as to whether the conversation took place in plaintiffs' apartment or elsewhere in the Building, these issues do not relate in a material way to the question of Vlad's liability. Instead, the undisputed evidence shows the leak in plaintiffs' apartment began in 1999, ten years before Vlad performed work at the Building. In addition, while plaintiffs allege that the leaks continued after the 2009 work performed by Vlad, they provide no evidence sufficient to create an issue of fact as to whether any work performed by Vlad, including the installation of the drain on the 11th floor terrace, was done negligently or caused or contributed to the leak in plaintiffs' apartment.

For the same reasons, the cross claims for contribution and indemnification asserted by the coop and JAL must be dismissed.

Accordingly, it is

ORDERED that Vlad's motion for summary judgment is granted; and it is further

ORDERED that the claims and cross claims against Vlad are dismissed; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the remaining parties shall proceed forthwith to mediation.

DATED: December 24, 2013



J.S.C.
HON. JOAN A. MADDEN
J.S.C.